August 4, 1975

Toby Prince Brigham, Esq.
Attorney at Law
Suite 1000D, Office In The Grove
2699 S. Bayshore Drive
Miami, Florida 31332

Re: Prince George's County, Maryland v.
Collington Crossroads, Inc.
No. 137 - September Term, 1974

Dear Mr. Brigham:

The Court has considered the petition for rehearing filed in the above entitled case and has denied said petition on August 1, 1975.

A copy of the mandate is enclosed.

The record is being returned to the Circuit Court for Prince George's County.

Very truly yours,

James H. Norris, Jr.
Clerk

JHNjr/h
Encl.
cc: Michael O. Connaughton, Esq.
John A. Buchanan, Esq.

IN THE

COURT OF APPEALS OF MARYLAND

September Term, 1974

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NO. 137

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PRINCE GEORGE'S COUNTY, MARYLAND, ET AL., APPELLANT,

v.

COLLINGTON CROSSROADS, INC., ET AL., APPELLEES.

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Appeal from Circuit Court for Prince George's County, Maryland

(Ralph W. Powers, Judge)

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PETITION FOR REHEARING

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SASSCER, CLAGETT, CHANNING & BUCHER
14803 Pratt Street
Upper Marlboro, Maryland 20870
and
TOBY PRINCE BRIGHAM
Suite 1000D, Office In The Grove
2699 S. Bayshore Drive
Miami, Florida
Attorneys for Appellee
Collington Crossroads, Inc.

# PETITION FOR REHEARING

The Appellee, Collington Crossroads, Inc., respectfully petitions the Court for a rehearing in the above styled cause for the following reasons:

The Opinion of this Court filed on June 5, 1975, announces important principles of eminent domain law for the State of Maryland which will have far reaching effect. The decision will be regarded by many as a departure from previous concepts; and by others the decision will be regarded as a necessary clarification in an area of law in which this Court recognized at page 11 of its Opinion that "...the Courts have had some difficulty in their efforts to define 'public use'." In any event the Opinion of the Court in this case will be regarded as a landmark decision.

As with any such case precedent, the principles announced will be given their meaning by a close analysis of the facts of this cause to see how and in what circumstances the principles were applied. What is done by the Court's decision has greater effect than what is stated in the Court's decision.

Appellee respectfully submits:

a) That in applying the concept of "public use"

intended by its Opinion of June 5, 1975; the Court overlooked certain significant matters established in the record of this cause; and

b) That if those certain matters of record had not been overlooked, the application of the principles of "public use" intended by the statements of that concept in the Opinion of June 5, 1975, would have resulted in the denial of the taking of Appellee's property under the facts and circumstances of this cause; and

c) That subsequent analysts of this Court's Opinion among the bench and bar of Maryland will assume that this Court considered the whole record without oversight and intended a meaning in the application of the concept of "public use" far different and beyond that actually intended by this Court.

Therefore, to prevent the taking of private property which the Court may agree would be contrary to law if the whole record is thoroughly considered; and to prevent

the creation of "rules of law" in the practice of eminent domain in this State which may not have actually been intended by this Court; the Appellee respectfully urges this Court to reconsider its application of the principles stated in its Opinion of June 5, 1975, in the light of the following particular matters which the Court may have previously overlooked:

1. The principle established by the Court's June 5, 1975, Opinion is that it must first be determined that private enterprise has not, can not, or will not provide the public benefit intended by a project before that project qualifies as a "public use" for which the power of eminent domain may be exercised. It makes the failure, inability or unwillingness of private enterprise to accomplish the public benefit the critical test of public use. (See pages 8, 9, 10 and 21 of the Opinion)

In the application of this principle, the Court made the following findings:

At pages 8 and 9, the Court said:

"Two factors relating to the condemnation

sought in this case should be emphasized.

> First, the County Council for Prince George's County and the County Executive, in adopting the task force's comprehensive plan, made the finding that the type of industrial park which it considered necessary for the economic well-being of the County would be too costly for private developers to carry out. The planned industrial park was meant to attract "research and development and other 'clean' industrial types" which the County had had difficulty attracting. Appellee did not present any evidence to dispute the County Council's and the County Executive's findings in this case. At oral argument, one of its contentions seemed to be that the County had an unfair advantage because of its exemption from taxes and power of condemnation, and thus should not be allowed to compete with private developers. Whatever merit this contention might have is lost in this case since the record indicates that the County will not be in direct competition with private entrepreneurs. Here the County plans a type of project which the private developers were apparently unable or unwilling to undertake." (Emphasis supplied)

At page 10, the Court asserted:

> "The above factors, failure of private developers to provide the necessary industrial park facilities and the continuing control the County will exert over the development of this facility, must be kept in mind in applying the cases which have dealt with the issue of what constitutes a public use." (Emphasis supplied)

At page 21, the Court stated:

> "Instead, the purpose is to provide for a type of industrial development believed by the County's elected officials to be needed in the County, which the private

> sector of the economy had failed to provide." (Emphasis supplied)
>
> and:
>
> "Under our cases, projects reasonably designed to benefit the general public, by significantly enhancing the economic growth of the State or its subdivisions, are public uses, at least where the exercise of the power of condemnation provides an impetus which private enterprise cannot provide." (Emphasis supplied)

It does no violence to the principle the Court wishes to establish to point out that the record contains evidence which does not support the conclusions of fact recited in the Opinion and quoted above with regard to the inability, unwillingness or failure of private industry to develop the desired industrial park project. They are as follows:

a) The Comprehensive Plan approved by the County Executive and the County Council and the testimony of the condemning authority's own expert witness, Dr. Wallace, establishes the following facts:

1) There is a profit to be realized from the planning, development and sale of the project of at least 14.1 million dollars after all expenditures and not

including increased tax revenues. (Pl's Ex. 6b, TR of Testimony April 8, 1974, pp. 52, 53, 54)

2) The only examples of industrial parks of the size and scope of that planned by Prince George's County were accomplished by private enterprise not the governmental agencies. (TR of Testimony April 8, 1974, pp. 44, 45, 46)

3) The role of the County in providing sewer, roads, water, comprehensive zoning, building and use regulations is no more than that which governments have done in the case of the other industrial parks of similar nature elsewhere or no more than the County would or should do here whether or not it owned the land. (TR of Testimony April 8, 1974, pp. 45 - 48)

4) The Appellee's property had never yet been zoned other than residential though long designated by regional planners as a high employment area. (TR of Testimony April 8, 1974, p. 33)

5) The County can provide the necessary control over development by proper zoning and use regulations, whether or not it owned the land. (TR of Testimony April 8, 1974, pp. 48 - 49 and 51)

When the record reveals that the County will make a profit of over fourteen million dollars after all expenditures and costs, is it correct to say that private enterprise could not do equally as well and be willing and able?

When the record reveals that it is the failure of the government to provide proper zoning and governmental planning and services which has prevented to date the accomplishment of the desired public benefit; is it correct to find that private enterprise has failed or is unwilling to accomplish the result?

When the record reveals that zoning and regulatory powers already exist by which the County can control the use and development of the subject property whether it is owned by the private owner or not; is it correct to say that the condemnation allows any different public control than is otherwise available?---especially when

all the property will be sold off anyway?

b) At page 9 of its decision, the Court stated that the owner produced no evidence to counter the findings of the County's Task Force. The Plaintiff, Prince George's County, had the burden of proving that the taking is necessary and a public use as a jurisdictional prerequisite. The owner should have no burden until the County establishes public use and necessity by sufficient competent evidence. The self-serving declaration of the "task force" are of no probative value and certainly are not any higher proof than the statements of Plaintiff's Exhibit 6b and Dr. Wallace's testimony on cross examination. It is on this evidence and testimony that the owner relied without having to adduce more.

c) At page 20 of the Court's Opinion, it is stated, "There has been no suggestion in this case that the purpose of the County's action is to benefit any particular private

> businesses or persons...", but the record does suggest that the County itself is not acting in its governmental role but rather is acting out of a profit motive and in a proprietary capacity. As such, the Plaintiff itself rather than a third party is in the role of the prohibited private interest. Dr. Wallace for the County testified that the justification for public ownership was so that the public could make the profit from the development and not the private owner. (TR of Testimony April 8, 1974, pp. 46 and 47)

The record in this cause is not one where the public control over the development and use of the land is enhanced by condemnation because no greater control is being exerted than that which would or could ordinarily be exerted.

The record in this cause forcefully shows that the condemning authority has failed to do its part in properly providing governmental services and planning and zoning regulations so that it allows one to say,

"You see, private enterprise hasn't done the job." The fact is shown that there is sufficient profit to where it is more accurate to say private enterprise is willing, able and ready to do the job if the government will do its part, which it hasn't yet done.

WHEREFORE, the premises considered, the Appellee asserts that if the test of "public use" is to be whether or not private enterprise has, or can, or is willing to accomplish the public benefit intended; then the decision of this Court should deny the taking because the record shows that if the County would perform its police power roles, there would not be any reason private enterprise couldn't, or wouldn't, accomplish the intended result.

OR, in the alternative, in view of the importance of this decision to the litigants and to the jurisprudence of the State of Maryland, the Appellee requests that the cause be remanded for further hearing on the issue which the Court has announced in its Opinion of June 5, 1975; to-wit: Whether or not private enterprise

has failed, is unwilling, or is unable to accomplish the public benefit intended by the project for which the taking is sought.

To allow this cause to go back to the trial level for hearing on such proof would not be unlike the same privilege previously granted in this cause to the Appellant to develop a comprehensive plan of the project before a final decision was made in this cause.

In any event, to reach a decision which allows the taking of Appellee's property on the record of this cause which not only fails to meet the Plaintiff's burden of proof but predominates in the owner's favor on the issue announced by the Court would deprive the owner of its property without due process of law, and a rehearing on these matters and points is hereby requested by Appellee.

Respectfully submitted,

Toby Prince Brigham

TOBY PRINCE BRIGHAM
Of Counsel

SASSCER, CLAGETT, CHANNING
& BUCHER
14830 Pratt Street
Upper Marlboro, Maryland 20870

and

TOBY PRINCE BRIGHAM
Suite 1000D, Office In The Grove
2699 South Bayshore Drive
Miami, Florida

Attorneys for Appellee
Collington Crossroads, Inc.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 6th day of July, 1975, to Michael Connaughton, Assistant County Attorney, Courthouse, Upper Marlboro, Maryland, as attorney for the Appellant.

Toby Prince Brigham
TOBY PRINCE BRIGHAM